IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 34

THE SAGE STORES COMPANY, a corporation, and CAROLENE PRODUCTS COMPANY, a corporation, *PETITIONERS*,

AGAINST

THE STATE OF KANSAS, *EX REL.* A. B. MITCHELL (substituted as Attorney General), *RESPONDENT*.

BRIEF OF PETITIONER, THE SAGE STORES COMPANY

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PRELIMINARY STATEMENT

The petitioner, The Sage Stores Company, a corporation, concurring in the points covered by the brief and argument of the petitioner, Carolene Products Company, files this separate brief in emphasis of the points herein discussed which are of especial importance to it as a local retail merchant desirous of supplying its customers with wholesome and valuable food products for which there is a popular demand.

It is alleged in the amended petition of the State that The Sage Stores Company is a Kansas corporation with its principal place of business at Topeka, Kansas (R. 3); the nature of its business being "retail groceries and meats," and at the time

the suit was filed it was selling and keeping for sale "Carolene." (R. 4.)

The answer of this petitioner, after admitting the foregoing allegations of the amended petition (R. 30) alleged among other things:

That the food compound Carolene "is a wholesome, nutritious, non injurious, unadulterated and beneficial food compound" (R. 32); that it complies in all respects with federal and state food and drug laws, and is properly and plainly labeled with a prominent warning that the product is not evaporated milk or cream (R. 36); that there is no fraud in the sale thereof; there are no circumstances attendant to the regulation and sale of foods in Kansas that would give rise to any administrative difficulty because of the sale of this product; no detriment to the public health, safety, welfare or morals arising from the sale of this product; that a product of this character was not in existence or discovered at the time the Kansas statute, Chap. 226, Laws of Kansas, 1923, (Gen Stat—1935, Sec. 66-707), was enacted and that there was no rational basis for the enactment of the law covering prohibition of a product of this character. (R. 37.)

That there is a decided under-consumption in Kansas of the valuable food factors found in skimmed milk; and that the sale of Carolene at a price substantially less than the price of evaporated whole milk makes the beneficial and essential food factors of milk available through this product to a class of the public from whose reach evaporated whole milk is withheld by its higher price. (R. 44.)

The answer of this petitioner concluded with the plea that the enforcement of the prohibitions of this statute deprives this petitioner of its liberty and property and of the equal protection of the laws in violation of the Fourteenth Amendment, because,

"The prohibition of the sale of a pure, wholesome, sanitary, nutritious, and unharmful food compound, and punishment therefor, is contrary to public policy, is an arbitrary and unreasonable interference with private persons, is wholly without the scope of the police power, is an unreasonable and unnecessary restriction upon trade, and is therefore unlawful, oppressive and unrelated to the health, welfare, safety or morals of the people of this state or any of them." (R. 44.)

The evidence introduced resulted in findings of the Commissioner fully supporting the foregoing allegations of this petitioner's answer. In the opinion of the majority of the court below, it was held that "the findings on material matters are substantially correct." (R. 659.) Without burdening this brief with a repetition thereof, we respectfully refer the Court to the epitomized findings as set out in the principal brief filed herein by the petitioner, Carolene Products Company. The judgment entered below enjoined this petitioner from further "selling or keeping for sale the product of the defendant Carolene Products Company." (R. 651.)

SPECIFICATION OF ERROR

In granting the writ, this Court limited the review to the first specification of error set out in the petition for the writ, which reads:

"The Kansas Supreme Court erred in holding constitutional Section 65-707 (F) (2) General Statutes Kansas 1935, which absolutely prohibits the sale of Carolene, a wholesome and nutritious food product. Said section deprives the petitioners of their liberty and property in violation of the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States."

SUMMARY OF ARGUMENT

The principal brief herein prepared by counsel for the Carolene Products Company, in our opinion, sets forth forcefully and clearly (*a*) a summary of the pertinent facts involved in this case, and (*b*) a convincing argument on the constitutional questions involved. We have therefore joined in the filing of the principal brief, and we concur wholeheartedly in the contentions therein made.

The situation of our client as a local merchant, dealing directly with the consuming public in the present period of acute shortage in food supplies, particularly milk, is such that we feel it appropriate to present to the Court a brief argument on two legal propositions which may be summarized as follows:

I.

The right of the mass of the public to purchase and enjoy articles for which there is a popular demand and which are useful and non-deleterious outweighs any supposed right to absolutely prohibit their sale because of the possibility or even the probability that occasionally a member of the public may be deceived or misled into buying such an article when he believed he was buying a similar article.

II.

A statute, although valid when enacted, may by reason of later events bringing about a change in the conditions to which it is applied, became arbitrary and confiscatory, and therefore invalid.

ARGUMENT

I.

The Right of the Mass of the Public to Purchase and Enjoy Articles for Which There is a Popular Demand and Which are Useful and Non-deleterious Outweighs Any Supposed Right to Absolutely Prohibit Their Sale Because of the Possibility or Even the Probability That Occasionally a Member of the Public May be Deceived or Misled Into Buying Such an Article When He Believed He Was Buying a Similar Article.

The Commissioner's Finding No. 38 (R. 511-512) reads:

> "Defendant's product is used principally by families in the low income group. It is used as a substitute for milk and cream and has no other use. It has had good customer acceptance. The evidence clearly shows that the housewives who have used it prefer it to evaporated whole milk. Among the reasons given for such preference are that it has a better taste than evaporated milk; that it will whip and so can be used as a substitute for whipping cream; that it is cheaper and that it will keep longer (as heretofore found, hydrogenated cottonseed oil has a greater resistance to rancidity than butterfat), than evaporated whole milk, which is important to families who lack refrigeration facilities."

This Court said in the case of *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 46 S. Ct. 320, 70 L. Ed. 654:

> *"Shoddy-filled comfortables made by appellee are useful articles for which there is much demand; and it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden. They are to be distinguished from things that the state is deemed to have power to suppress as inherently dangerous."* (270 U.S. 412-413.) (Italics ours)

This Court further said in the same case:

> *"The constitutional guaranties may not be made to yield to mere convenience. Schlesinger v. Wisconsin,* 46 S. Ct. 260, 270 U.S. 230, 70 L. Ed. 557, decided March 1, 1926. *The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment. Adams v. Tanner,* 37 S. Ct. 662, 244 U.S. 590, 596, 61 L. Ed. 1336, L.R.A. 1917F 1163, Ann. Cas. 1917D 973; *Meyer v. Nebraska,* 43 S. Ct. 625, 262 U.S. 390, 67 L. Ed. 1042, 29 A.L.R. 1446; *Burns Baking Co. v. Bryan,* 44 S. Ct. 412, 264 U.S. 504, 68 L. Ed. 813, 32 A.L.R. 661." (270 U.S. 415.) (Italics ours.)

This Court also said in the case of *Burns Baking Co. v. Bryan,* 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813:

> *"But a state may not, under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. Lawton v. Steele,* 152 U.S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385; *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 Sup. Ct. 625, 67 L. Ed. 1042. *Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted."* (l.c. 264 U.S. 513.) (Italics ours.)

* * * * * * * *

"The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers. The lessening of weight of bread by evaporation during 24 hours after baking does not reduce its food

value. *It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation and to keep within limits of tolerance so narrow as to require that ordinary evaporation be retarded by wrapping or other artificial means.*" (Ic. 264 U S. 516.) (Italics ours.)

The customers of this petitioner, The Sage Stores Company, are among that class of the public referred to by the Commissioner when he found that Carolene "is used principally by families in the low income group. * * * It has had good customer acceptance * * * housewives who have used it prefer it to evaporated whole milk, * * * it has a better taste than evaporated milk * * * it will whip * * * it is cheaper * * * it will keep longer * * * than evaporated whole milk." (Finding of Fact No. 38, R. 511-512.)

Applicable to this phase of our argument is the closing paragraph of the lower court's minority opinion in the instant case, which reads:

> "When the rights of the citizen come in conflict with actual public welfare, the rights of the former must, of course, yield. Manifestly that is fundamental and sound doctrine. I am, however, unwilling to see constitutional guaranties of the citizen's right to engage in a legitimate business whittled away when there is no reasonable basis for believing that the public welfare could not be protected adequately by regulation of the business. It is not only important that the constitutional guaranty to the citizen to transact a legitimate business should be zealously protected by the courts. *It is also most vital that the public should not be deprived of its right to purchase a desirable and healthful article of food which scientific research and discovery have made available to the public at a low cost and in a form easily preserved by the citizen in the lower income groups who is not blessed with refrigeration facilities. The sale of such*

an article may be in competition with another industry but, under proper regulation, it cannot reasonably be said to be in conflict with the public interest and welfare." (R. 680.) (Italics ours.)

We note that any attempt to sustain the Kansas statute "as a measure to prevent deception" brings about a striking similarity when the case is compared with *Weaver v. Palmer Bros. Co., supra.* On that point in that case, this Court called attention to the fact that under the law of the state it was then considering, certain regulations had been provided to prevent deception in the sale of shoddy-filled comfortables, the Court's ruling on that point being as follows:

> "Nor can such prohibition be sustained as a measure to prevent deception: * * * (The court then described the existing regulations on articles of bedding.) Obviously, these regulations or others that are adequate may be effectively applied to shoddy-filled articles."

The only basis for a claim of deception in the sale of Carolene is that in a few instances clerks in retail stores were not careful to advise customers who bought Carolene that it was not whole milk, and that in a few instances over a two-year period some retail store advertisements of Carolene referred to it as "milk." (R. 509-510.)

The manufacturer was found to have used all proper precautions to avoid sale of the product as milk; and in the two stores of this petitioner "it was never sold as canned milk." (R. 420.)

The offending retail merchant who sold Carolene as and for milk was subject to prosecution under the Kansas statute which prohibits "offering any product for sale under the name of any other food" (Sec. 65-608, G.S. Kan. 1935); and those who advertised it as milk were subject to prosecution unde-

Sec. 21-1112, G.S. Kan. 1935, forbidding "false, misleading or fraudulent advertising."

Paraphrasing the language quoted above from the opinion of this Court in *Weaver v. Palmer Bros. Co., supra:*

> "Obviously, these regulations or others more adequate may be effectively applied to filled milk."

As aptly said by the Supreme Court of Nebraska in *Banning v. Carolene Products Co.*, 131 Neb. 429, 268 N.W. 313:

> "If retailers of a wholesome and nutritious food product practice deception in its sale, the remedy is by regulation and not by a destruction of the business."

II.

A Statute, Although Valid When Enacted, May By Reason of Later Events Bringing About a Change in the Conditions to Which it is Applied, Become Arbitrary and Confiscatory and Therefore Invalid.

Referring again to the statement of this Court in *Weaver v. Palmer Bros. Co., supra,*

> "It is a matter of public concern that the production and sale of things necessary and convenient for use should not be forbidden" (270 U.S. 412),

and to the quotation from the opinion of this Court in *Burns Baking Co. v. Bryan, supra,*

> "The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food and plaintiffs in error and other bakers have a right to furnish it to their customers." (264 U.S. 516.)

The foregoing declarations of the public's concern in the production and sale of things necessary and convenient for use were made in the hey-day of our economic prosperity. They related to articles of household use that were manufactured out of secondhand cloth in which there naturally inhered some sanitary danger to public health, and to unwrapped bread, for which there was a public demand. There were available then plenty of comfortables made entirely of new whole materials, the superiority of which over shoddy filled comfortables was hardly debateable. Yet the Court recognized the fact that by reason of the public concern in the right to purchase a useful article at reduced cost, reasonable regulations to secure sanitary protection and reasonable regulations to protect against the possibility of occasional deception marked the limit of legislative authority. Absolute prohibition of the sale of such articles goes beyond constitutional limitations.

So it would appear that, even at a time when economic conditions in this country were stable and normal, Carolene being not merely economical but being also a "useful article for which there is much public demand" and being "necessary and convenient for use," economic considerations alone made "it a matter of public concern that the production and sale * * * should not be forbidden."

We ask the Court to consider with what compelling necessity the economic situation existing in this country at the present time calls for enforcement of the rule that "it is a matter of public concern that the production and sale of" a wholesome, useful and popular article that aids in relieving not only the milk shortage but the butter shortage "should not be forbidden."

The record in this case brings out the serious shortage both of butter and milk that confronts the nation. The Court, however, will, in addition to the facts in the record,

undoubtedly take judicial notice of such facts as are matters of common knowledge.

Ration Order No. 16 (Code of Federal Regulations, Title 32, Chapter 11, Part 1407) includes canned milk, among many other rationed foods, and provides point values which must be observed by purchasers at retail stores. War Food Order No. 8, entitled, "Restrictions on the Production of Frozen Dairy Foods and Mix" (Federal Regulations, Title 7, Chapter 11, Part 1401, Sec. 1401.31, issued January 19, 1943, effective February 1, 1943, 8 Fed. Reg. 953), limits the processors of frozen dairy foods to a fraction of the quantity of total milk solids used during corresponding periods of earlier years. The Federal Register of June 7, 1944, contains Amendment 2 to War Food Order No. 13, Part 1401, relating to dairy products. This amendment limits the amount of fat that cream may contain when sold to consumers. Of course, this Court knows and will take judicial notice of the fact that a large proportion of the canned milk produced has been reserved by the government for use by the armed forces.

Our client puts to us the question: "Why can the law deny me the right at any time, and particularly under present conditions, to purchase and sell to my customers, honestly and free from any misrepresentation as to its character, an article such as Carolene, which is found by the Court to be pure and wholesome, and which my customers definitely prefer to canned condensed milk?"

We are unable to give to our client an answer to this question that will satisfy a layman's mind. We are frankly unable to answer the question in such a manner as will justify the prohibition on grounds which we believe adequate to satisfy a legal mind.

The Kansas statute was enacted in 1923 when fortification of foods with essential vitamins was unknown, when there was no such shortage in the milk supply as now prevails.

With the nation facing present shortages in its food supply, the necessity for rescuing for consumption as human food the millions of pounds of skimmed milk now wasted is a matter of vital public concern. The defendant's product contributes to that desirable result, with no hazard to the public health. The millions of dollars being spent by our government to find substitutes for pure rubber are being wisely spent, though synthetic rubber may lack some of the good qualities of natural rubber. If a statute had been enacted in 1923 forbidding the production and sale of synthetic rubber, the courts would today without hesitation strike down such an enactment in the light of present-day scientific progress and also in the light of present economic conditions.

In *Abie State Bank v. Weaver*, 282 U.S. 765, 51 S. Ct. 252, 75 L. Ed. 690, a Nebraska guaranty statute which had been held valid in 1910 (*Shallenberger v. First State Bank*, 219 U.S. 114), was held invalid under conditions existing in 1931. In *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 44 S. Ct. 405, 68 L. Ed. 841, a rent-control act that had been held valid in 1919 (*Block v. Hirsh*, 256 U.S. 135) was held invalid in 1924. In *Newton v. Consol. Gas. Co.*, 258 U.S. 165, 42 S. Ct. 264, 66 L. Ed. 538, a statutory rate which had been sustained for earlier years (*Willcox v. Consol. Gas Co.*, 212 U.S. 19, 29 S. Ct. 192), was held confiscatory for 1918 and 1919. In *Nashville, C. & St. L. Ry. Co. v. Walters*, 294 U.S. 405, 55 S. Ct. 486, 79 L. Ed. 949, this Court speaking through Mr. Justice Brandeis, held that a changed condition in traffic due to the development of the automobile was a matter to be taken into consideration by the Court in determining the validity of a statute imposing a part of the cost of grade separation crossings upon a railroad company.

The underlying principle upon which the decision rendered in each of the foregoing cases rested was that a statute, although valid when enacted, may, by reason of later events

bringing about a change in the conditions to which it is applied, become arbitrary and confiscatory and therefore invalid.

We respectfully submit that upon the same principle the Kansas filled milk statute should be held arbitrary, confiscatory and unconstitutional.

Respectfully submitted.

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